

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT 31 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TOMMORIES W.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
DOMINIC B.,

Appellees.

2 CA-JV 2008-0070
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18138000

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

Peter G. Schmerl

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

PELANDER, Chief Judge.

¶1 Appellant Tommories W. appeals from the juvenile court's July 2008 order terminating his parental rights to Dominic B., born in April 2002, on the grounds of

abandonment and incarceration for a felony conviction for a sufficiently long period that Dominic would be deprived of a normal home for a period of years. *See* A.R.S. §§ 8-533(B)(1), (4). We affirm for the reasons stated below.

¶2 The Arizona Department of Economic Security (ADES) removed Dominic from his mother's home in February 2007 because of her substance abuse, neglect of the child, and admitted inability to care for him. ADES filed an initial dependency petition, then filed an amended petition as to both of Dominic's parents in March 2007, alleging, *inter alia*, that Tommories's whereabouts were unknown, that he had a criminal history that included convictions for forgery and armed robbery, that he had been found in possession of drugs while incarcerated, and that he had been released from prison in December 2005. A Child Protective Services (CPS) specialist filed an affidavit of unknown residence, stating she had searched a variety of public sources, including numerous correctional facilities, and had been unable to locate Tommories. Consequently, ADES served him with the amended dependency petition by publication. In May 2007, the court adjudicated Dominic dependent as to Tommories after a hearing that Tommories did not attend. The court approved the case plan goal of reunification and ordered Tommories "to contact the Department should he desire reunification services."

¶3 In January 2008, ADES filed a motion for termination of the parental rights of Dominic's parents.¹ Among the allegations as to Tommories was that he had abandoned Dominic. ADES again tried to locate Tommories, finding him in a prison in Yuma and

¹The mother's rights were severed in March 2008 after she failed to appear at a settlement conference. She is not a party to this appeal.

personally serving him with the motion for termination and the notice of the initial severance hearing, which had been set for April 2, 2008. Tommories did not appear for the initial severance hearing. Although ADES requested that the termination hearing proceed, the juvenile court refused on the ground that Tommories's "status" in prison was not clear. Thereafter, ADES filed an amended motion to terminate Tommories's rights in which it again alleged he had abandoned Dominic but alleged further that Tommories had been convicted of a felony and sentenced to prison for a term that would deprive the child of a normal home for a period of years. ADES alleged Tommories was not eligible for release from prison until 2011. Tommories appeared and testified at the termination hearing in July 2008. At the end of the hearing, the juvenile court granted ADES's amended motion, terminating his parental rights to Dominic on both grounds alleged.

¶4 As ADES correctly points out, Tommories's arguments in the headings of his opening brief do not correspond entirely with the issues raised in the body of the brief. We only address the issues as they are argued. *See* Ariz. R. P. Juv. Ct. 106(A); Ariz. R. Civ. App. P. 13(a)(6).

¶5 Tommories first contends the termination order must be "vacated" because the order adjudicating Dominic dependent as to him must be "reversed." He contends the dependency adjudication must be "reversed" because serving him by publication was improper. Tommories faults ADES for not finding him and personally serving him with the dependency petition and asserts summarily that his constitutional rights to due process and counsel were violated.

¶6 First, Tommories cannot collaterally challenge the propriety of the dependency adjudication in an appeal from the termination order. An order adjudicating a child dependent is a final, appealable order, as are subsequent orders finding the child's dependent status continues to exist. *See Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶ 7, 127 P.3d 59, 61 (App. 2006).

¶7 Second, even assuming Tommories could challenge the termination order by challenging the validity of the dependency adjudication, nothing in the record before us supports his contention that the juvenile court erred when it permitted ADES to serve him by publication and adjudicated Dominic dependent as to him after a hearing held in his absence. As we noted above, the CPS specialist for ADES had filed an affidavit in which she avowed she had been unable to locate Tommories in order to effect personal service. She specified the efforts she had made to find him, including investigating whether he was incarcerated in a number of correctional facilities. That Tommories ultimately was found in prison and personally served with the motion and amended motion to terminate does not mean the juvenile court lacked authority to proceed as it did with regard to the dependency. Nor does it change the fact that, as discussed below, ADES presented sufficient evidence to support the termination of his parental rights after Tommories was personally served and attended a contested hearing, at which he testified.

¶8 Tommories's second argument is that ADES failed to present sufficient evidence he had abandoned Dominic. He notes his own testimony at the termination hearing that he desired to maintain a relationship with the child, that he had been incarcerated in 2005 when he was served with a paternity complaint, and that he had demonstrated his

interest in Dominic by filing a petition for joint custody. He claims, as he testified, that he “did not know he could write to the child in care of the Department until two weeks prior to the [severance] trial.” He also asserts that, if he had been “properly served” with the dependency petition and provided reunification services, he would have maintained contact with Dominic.

¶9 We will not disturb a juvenile court’s order unless the order is clearly erroneous. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). As long as there is reasonable evidence to support the factual findings upon which the order is based, we will affirm. *Id.* We view the evidence in the light that is most favorable to upholding the factual findings upon which the court’s order is based. *See Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000).

¶10 Section 8-533(B)(1) provides that a parent’s rights to a child may be terminated if “the parent has abandoned the child.” A parent abandons a child if the parent fails “to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. . . . Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.” A.R.S. § 8-201(1). ADES was required to establish by clear and convincing evidence that Tommories had abandoned Dominic. *See Ariz. R. P. Juv. Ct.* 66(C); *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶11 Melissa Ann Duncan testified at the July 2008 termination hearing that she had been the case manager for Dominic since March 2007 and during that time Tommories

had never visited Dominic; had never sent him cards, gifts, letters or support; and had never communicated with her as case manager. Duncan stated she had not had a correct address for Tommories until January 2008. The previous case manager, however, had attempted to send a letter to Tommories in 2007 at an address CPS had on file. Duncan testified further that Dominic had lived most of his life with his maternal grandmother, who wished to adopt him. She agreed on cross-examination that she had not checked correctional records to locate Tommories until January 2008.

¶12 Tommories testified at the severance hearing that he had first learned about Dominic's existence in early 2005, when he was served with a paternity action while he was incarcerated in Tucson. He filed an answer to the paternity complaint, though he claimed he did not know he could request visitation. He conceded he had not made any attempts to locate Dominic after he was served and had never attempted to contact CPS, insisting he did not know how. When asked why he was contesting the motion to terminate his rights, he stated he had not had "a chance to be there I wanted to be there from the beginning but I was incarcerated at that time and I'm still incarcerated, you know. . . . There's no reason why I shouldn't be involved in my son's life."

¶13 Tommories testified on cross-examination by Dominic's counsel that he knew Dominic was six years old, that he had never met the child, and that his prison release date is December 2011, by which time Dominic will be nine.² He agreed it was in Dominic's best

²The conviction and sentencing minute entry, which was introduced as an exhibit, reflects that Tommories was convicted of misconduct involving weapons and was sentenced on January 15, 2008, to a five-year prison term, for which he received 128 days' presentence incarceration credit.

interests to remain with his grandmother. Upon cross-examination by ADES, Tommories admitted there had been telephone numbers on the documents served on him for the severance proceeding and yet he had contacted no one about Dominic. And, he agreed he had never been a father to Dominic.

¶14 The evidence more than adequately supported the juvenile court's finding that Tommories had abandoned Dominic. He has never met the child or provided him with support, much less ever had a relationship with him. As the court found, and the evidence established, other than one attempt in 2005 in connection with the paternity action, Tommories has "made no efforts to attempt to locate his child." Tommories seems to suggest that ADES was somehow required to help him not abandon his child by locating and serving him during the dependency proceeding or at least earlier than January 2008. As ADES pointed out at the termination hearing, however, "[e]fforts to locate a parent [are] not an element" required to justify termination on the ground of abandonment. And, as ADES also pointed out, it is not required to provide reunification services for a parent who has abandoned a child. *See Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, ¶ 15, 993 P.2d 462, 467 (App. 1999) (neither does statute require that parent who has abandoned child be provided reunification services, nor is there constitutional basis for such requirement). To the extent Tommories impliedly suggests otherwise, he is mistaken.

¶15 Although we need only find one statutory ground proven in order to affirm the court's order, *Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687, we note there was also sufficient evidence warranting termination of Tommories's rights pursuant to § 8-533(B)(4). The juvenile court considered each of the relevant factors identified by our supreme court

in *Michael J.* 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88. The evidence established that Tommories had been incarcerated for all but “thirty days here and thirty days there” since 1998 and that he is not eligible for release until 2011. He has never had a relationship with Dominic. And again, to the extent Tommories is suggesting ADES was required to provide reunification services, he is wrong. *See James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, n.4, 972 P.2d 684, 688 n.4 (App. 1998) (finding reunification services not required when length of prison term is such that services could not remedy child’s deprivation of normal home for period of years); *see also James H. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 1, ¶¶ 6-9, 106 P.3d 327, 328-29 (App. 2005) (same). Here in particular, where there was no relationship to preserve in the first instance, no services were required. *See Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

¶16 For the reasons stated herein, we affirm the juvenile court’s order terminating Tommories’s parental rights to Dominic.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge